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Supreme Court, U.S.
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No. 00-524

In The

Supreme Court of the United States

MICHAEL R. BARFUS, et al.,

Petitioners,

vs.

CITY OF MIAMI, a municipal corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. DOES THE ELEVENTH CIRCUIT DECISION CONFLICT WITH ESTABLISHED PRECEDENT OF THIS COURT BY APPROVING THE CITY OF MIAMI'S USE OF RACE-BASED PROMOTIONAL QUOTAS WHICH DID NOT TAKE INTO ACCOUNT THE AVAILABILITY OF QUALIFIED APPLICANTS AND WHICH EXCLUDED A CLASS OF EMPLOYEES FROM PROMOTION SOLELY BECAUSE OF RACE?

LIST OF PARTIES TO THE PROCEEDING

Michael Barfus

Jack Chambers

Darrell Hawks

Edmond Lamb

Robert Robinson

Terry Remland

Michael Fisher[1]

City of Miami, Florida

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[1] Michael Fisher originally participated as a plaintiff in this action but is not a party to this appeal.

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SUMMARY OF THE ARGUMENT

The City does not dispute that the percentage of minorities promoted to Fire Lieutenant under the Consent Decree exceeded the City's thirty-eight percent departmental promotional goal. Nor does the City dispute that it utilized a department-wide promotional goal which did not accurately take into account the number of qualified applicants for promotion to Fire Lieutenant. The department-wide goal included civilians ineligible for consideration for promotion to Fire Lieutenant and assumed the participation of women, when in fact no female firefighters competed for selection on the promotional examination at issue. In effect, the City takes the position that the Consent Decree provided it with the plenary authority to promote an unlimited number of minority candidates for Lieutenant so long as total departmental promotions did not exceed the thirty-eight percent departmental goal. The City's position is contrary to the well-established authority of this Court and the Eleventh Circuit. The Eleventh Circuit Court's refusal to recognize the existence of unlawful discrimination against the Firefighters on these facts constitutes a departure from well-established precedent sufficient to justify this Court's acceptance of Certiorari jurisdiction.

ARGUMENT

I. THE ELEVENTH CIRCUIT DECISION CONFLICTS WITH ESTABLISHED PRECEDENT OF THIS COURT BY APPROVING THE CITY OF MIAMI'S USE OF RACE-BASED PROMOTIONAL PREFERENCES WHICH DID NOT TAKE INTO ACCOUNT THE AVAILABILITY OF QUALIFIED APPLICANTS AND WHICH EXCLUDED A CLASS OF EMPLOYEES FROM PROMOTION SOLELY BECAUSE OF RACE.

The City's use of a department-wide promotional goal which did not take into account the number of qualified applicants for promotions to the rank of fire lieutenant violated Title VII. Moreover, the City exceeded the flawed department-wide goal, despite the fact that the promotional goal included ineligible civilians and assumed the participation of women where no female firefighters competed for selection on the promotional exam in question. Petitioners respectfully pray this Honorable Court to accept jurisdiction in this matter and consider this case on its merits.

The City argues that notwithstanding the fact that forty-four percent of the candidates promoted to Fire Lieutenant were minorities, it did not exceed the City's thirty-eight percent department-wide promotional goal. The City also attempts to defend its discriminatory promotion practices by arguing that test scores were only one of several factors used in the promotion process.

Due to the relative lack of minority candidates at higher levels in the Department, the City sought to pile on promotions at the Lieutenant level. This was not only in disregard of the Consent Decree's requirement that

promotions be made subject to the availability of qualified applicants, but also ignored the significant fact that there were no female candidates competing for promotion to Fire Lieutenant. Accordingly, the City's blind adherence to an arbitrary promotional goal was discriminatory and in violation of the Consent Decree's prohibition against discrimination on the basis of race.

The fact that the City fell short of its overall departmental promotional goal does not justify the preferential promotion of an unlimited number of minorities at the Lieutenant level. By not taking into effect the number of qualified applicants, the thirty-eight percent departmental promotional goal was discriminatory, particularly as applied at the Lieutenant level where no female candidates had applied for promotion.

The City's statement that test scores were only one of several factors considered ignores the record evidence to the contrary. First, Ms. Daniels, then the City's Affirmative Action officer, testified that interviews were discretionary and not universally used in the promotion process. [R. 43 (deposition of Hattie Daniels at p. 70)]. Ms. Daniels further testified that the departmental promotional goal did not take into account the number of minority candidates eligible for promotion at the Lieutenant level. [R. 43 at p. 53]. Secondly, Plaintiffs were the only firefighters on the promotional list who did not receive promotions, notwithstanding their higher test scores. Moreover, the 1982 and 1983 promotional registers for Lieutenant were terminated after being in place for only half of their normal duration once all minority candidates were promoted regardless of rank.

The City argues in conclusory fashion that the case authority relied upon by the Petitioners is inapplicable because the legality of the Consent Decree had never been challenged. The City misses the point. Although the legality of the Consent Decree itself is not challenged in this action, Petitioners' Title VII suit is based on the theory that the City's actions constituted the discriminatory application of the Consent Decree and that the City's arbitrary promotional goals were in violation of the terms of the Consent Decree and, consequently, a violation of Title VII.

It is undisputed that the number of qualified applicants (firefighters with the necessary time in grade and successful completion of the promotional exam) was never considered by the City in making race-based preferential promotions which exceeded the City's 38% promotional goal. This Court has long held that race-conscious remedies are subject to strict scrutiny and that promotional goals must take into account the qualifications of the relevant applicant pool. *See City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

The City's reliance upon this Court's decision in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) is misplaced. *Johnson* has clearly been revised by later decisions of the Court in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). *See Hill v. Ross*, 183 F.3d 586, 588 (7th Cir. 1999) (Easterbrook, J.) (indicating that some of the "underpinnings" of *Johnson* were removed by *Adarand*). These later cases establish that any use of race-conscious preferences must be judged on the basis of strict scrutiny. *See*

Adarand, 515 U.S. at 227. When strictly scrutinized, race-based preferences must be narrowly tailored to further a compelling governmental interest. *Id.*

Under strict scrutiny, racial preferences are only permissible as a remedy for past discrimination. In order to receive a preference, one must also be an actual victim of discrimination. The recipients of race-based preferences in this case met neither criteria. *See Croson*, 488 U.S. at 498-500 (holding that past societal discrimination against a group confers no basis to provide a remedy to current members of that group); *Hopwood v. Texas*, 78 F.3d 932, 949 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996) (indicating that justification for an affirmative action program must be based on "the present effects of past discrimination"). Mere blind adherence to the numbers is no longer the law of the land. *See Hopwood*, 78 F.3d at 941 (observing that the Supreme Court has consistently "rejected arguments conferring benefits on a person based solely upon his membership in a specific class of persons").

The only victims in this case are the six white male firefighters who were denied promotions and career advancement solely on the basis of race. Their working lives have been irrevocably altered in the same way that all victims of racial discrimination are scarred. Thus far, justice has eluded them, but the law clearly supports their claims. The intervention of this Court is the only hope for these six firefighters, now in the twilight of their careers, to achieve the economic rewards wrongfully deprived them. If true racial equality for *all* workers is

truly the Law of the Land then the acceptance of jurisdiction by this Court is fully warranted.

CONCLUSION

This Court has repeatedly held that race-conscious remedies are subject to strict scrutiny and must take into account the qualifications of the relevant applicant pool. Nevertheless, the City arbitrarily used a flawed departmental promotional goal which failed to take into account the qualifications necessary for promotion to the rank of Fire Lieutenant. The Eleventh Circuit erred by holding that the Petitioners failed to prove discrimination on these facts. The Petitioners respectfully assert that the Eleventh Circuit's decision constitutes an irreconcilable conflict with this Court's decisions. Wherefore, for the foregoing grounds and reasons, Petitioners respectfully pray this Honorable Court to accept jurisdiction in this matter and consider this case on its merits.

Respectfully submitted,

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